In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1557

GEORGE J. HOGAN AND MARIAN M. HOGAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issue in this case is whether amounts withheld from the "basic pay" of federal employees, and deposited to the credit of the Civil Service Retirement and Disability Fund, are includable in the gross income of these employees currently, as the decision below held, rather than when the retirement benefits are received.

1. Section 61 of the Internal Revenue Code of 1954 provides: "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including * * * [c]ompensation for services * * *." Petitioner,[1] a federal employee, contends (Pet. 8-10) that the full amount of his statutorily prescribed "basic pay" was not currently taxable as compensation because a part of

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[1] "Petitioner" refers to George J. Hogan. His wife, Marian M. Hogan, is a party here because she filed a joint return with her husband for the year in issue.

it was deducted from his paycheck as a required contribution to the federal retirement plan in which he (along with all other permanent Federal Civil Service employees) was a participating member. Petitioner argues (Pet. 9-10) that the withheld amounts constitute contributions to the Fund by his employer (the federal government), and for that reason should not be considered a part of his current gross income.[2]

The courts below correctly rejected petitioner's claim on the authority of *Miller* v. *Commissioner*, 144 F.2d 287 (C.A. 4), *Megibow* v. *Commissioner*, 218 F.2d 687 (C.A. 3). Accord: *Cohen* v. *Commissioner*, 63 T.C. 267, appeal pending, C.A. 9, No. 75-1578. In the *Miller* and *Megibow* cases, the Fourth and Third Circuits concluded that a civil service employee who accepts employment subjects himself to all provisions of law relating to civil service employees, including the provision (5 U.S.C. 8334(b)) declaring that he shall be deemed to consent that a certain percentage of his salary be deducted and used to provide benefits under the federal retirement plan. Accordingly, because the employees, like petitioner, consented to this arrangement as a condition of their employment, the courts held that the withheld amounts paid into the retirement fund were a portion of their salaries, which was currently taxable under Section 61 of the Code.

The courts below followed these squarely applicable appellate decisions, stating (Pet. App. A14): "We believe that * * * *Miller*, [and] *Megibow* * * * clearly represent accurate interpretation of the intention of Congress in

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[2]It is settled that an employee may not exclude from gross income amounts paid from his own wages to a retirement plan. There is no exception to that rule, and petitioner suggests none. Thus, in order to prevail, petitioner has to establish that amounts deducted and withheld from his "basic pay" and deposited in the Fund were not his contributions to the plan, but were made by his employer.

relation to the legislation in question." In so holding, the court noted (Pet. App. A14-A15) that if for some reason (such as being a temporary employee or a member of Congress who chooses not to participate in the plan) petitioner had not been eligible for the retirement plan, his compensation would have been the full amount of statutory salary for his classification or grade.[3]

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[3]For the first time, participation in the plan was made available to Congressmen on a voluntary basis in 1942. Act of January 24, 1942, c. 16, 56 Stat. 13, Sec. 3. The debate in Congress over how much each Congressman should pay as his share of the cost of participating in the plan shows that Congress viewed and intended mandatory employee contributions under the Act to be an out-of-pocket cost of the employee. See 88 Cong. Rec. 456-462 (1942).

The legislative history of the original federal retirement law establishes the point even more clearly (S. Rep. No. 99, 66th Cong., 1st Sess., p. 4 (1919)):

> The plan contemplated by the bill is what is known as the partially contributory plan, under which the Government and the employees respectively contribute a portion of the amount required for the purchase of a stated annuity. Whatever may be the ultimate conclusion, it is certain that, at the present time, the straight pension plan, aside from the support it would find among employees, would not have the approval of the general public. It is conceded that it would be a great burden upon the Government. The employees themselves now realize the situation and, in order that there may be relief from present conditions, are ready to contribute a just proportion of the amount which will serve to create an annuity on retirement.

Since Congress has never during the entire 55-year history of the Civil Service retirement law altered the Internal Revenue Service's administrative characterization of these amounts as currently taxable employee contributions (see, *e.g.*, T.D. 3112, 4 Cum. Bull. 76 (1921); Rev. Rul. 56-473, 1956-2 Cum. Bull. 22; Rev. Rul. 72-250, 1972-1 Cum. Bull. 22), the usual presumption that Congress has approved of such long-standing interpretative pronouncements applies in this case. See, *e.g.*, *United States* v. *Correll*, 389 U.S. 299, 305-306, and *Bingler* v. *Johnson*, 394 U.S. 741, 749-751. See also *Heard* v. *Commissioner*, 326 F.2d 962, 966 (C.A. 8). Indeed, this presumption of Congressional approval is strengthened further in this case by the fact that most Congressmen are themselves participants in the Civil Service Retirement Plan.

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2. Petitioner further argues (Pet. 8-10) that the decision below conflicts with *Pennie* v. *Reis*, 132 U.S. 464. There, the Court affirmed the California Supreme Court's decision, based on state law, that two dollars per month which was "retain[ed] from the pay of each police officer" to provide certain death and disability benefits for policemen generally was not truly compensation, and that the California legislature's repeal of the death benefits provision shortly prior to the death of the decedent police officer did not amount to a deprivation of property without due process of law. The Court reasoned that the "retained" amounts were simply part of a state appropriation for police benefits generally, and that no individual policeman had any vested right to such benefits.

Apart from the distinguishable context in which the *Pennie* case arose, in *Dismuke* v. *United States*, 297 U.S. 167, the Court effectively disposed of petitioner's contention that the rationale of *Pennie* is applicable to payroll deductions under the Civil Service retirement law. The question in *Dismuke* was whether the Tucker Act provided a jurisdictional basis for a Civil Service employee to sue in a district court to establish his right to a Civil Service annuity. The Court held the Tucker Act was inapplicable to "claims for pensions," concluding that the term "pensions" in the Act referred to gratuitous pensions of the type typically granted for military service. In so holding, the Court distinguished Civil Service annuities, stating (297 U.S. at 170):

> The annuities payable under the Retirement Act are not gratuities in that sense. The annuitant contributes to them by deductions from his salary or by actual payments into the fund, as in the present case, and the scheme of the Act is to provide for payment of annuities, in part at least from contributions by

> employees, in recognition both of their past services and of services to be performed.

See also *United States* v. *Price,* 288 F.2d 448 (C.A. 4); *United States* v. *Harue Hayashi,* 282 F.2d 599, 603 (C.A. 9).

3. Petitioner also contends (Pet. 10-12) that the decision below is inconsistent with *Hicks* v. *United States,* 314 F.2d 180 (C.A. 4). There, the court applied the doctrine of constructive receipt in holding currently taxable certain profit-sharing amounts paid directly into a trust by the employer pursuant to the instructions of the employee, who otherwise would have received the payments directly.

If the so-called "automatic deduction" in this case was an income-deferral arrangement, rather than a means of depositing a part of petitioner's current earnings to the credit of the Civil Service Retirement and Disability Fund, there would be a constructive receipt question. But petitioner and his federal government employer did not agree to a deferral of any part of his compensation. Congress provided that a federal employee was to receive the full amount of his basic pay, and petitioner, as a condition of employment, consented to use a part of that amount to pay his share of the cost of purchasing retirement benefits. Thus, when a Civil Service employee retires, he does not receive "basic pay" previously held back; he receives an annuity purchased with his own previously taxed contributions and the tax-free contributions made by his employing agency.[4]

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[4]The result reached in *Hicks* is fully consistent with the decision below and can in no event be read, as petitioner argues (Pet. 12), to have "implicitly overruled" the Fourth Circuit's decision in *Miller.* The express language of the *Hicks* plan prvided that the contribution to the trust "be treated as if it had been paid by such employee." Rev. Rul. 63-180, 1963-2 Cum. Bull. 189, 190. It was precisely this distinction between employer contributions and employee contributions which was relied upon by the courts below, as well as by the courts of appeals in *Miller* and *Megibow,* in holding that the amounts in issue here were currently taxable income.

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4. We do not take issue with petitioner's assertion (Pet. 14) that, because of the large number of civil service employees who are participants in the Civil Service Retirement Plan, the issue is important. But in view of the unanimous rejection of the claim by every appellate court that has considered it, there is no occasion for review by this Court.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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